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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SPY PHONE LABS LLC,

Plaintiff,

v.

GOOGLE INC., ANDREI CIUCA, d/b/a
CAD DESIGN, and JOHN DOES 1-49,

Defendants.

Case No.: 5:15-CV-03756-PSG

Honorable Paul Singh Grewal

SECOND AMENDED COMPLAINT

DEMAND FOR JURY TRIAL

1 Plaintiff Spy Phone Labs LLC (“Plaintiff”), by its undersigned attorneys, for its second
2 amended complaint in this action against defendants Google, Inc. (“Google”), Andrei Ciuca
3 (“Ciuca”), d/b/a Cad Design, and John Does 1-49 (the “Doe Defendants”), alleges as follows:

4 INTRODUCTION

5 1. This action asserts claims under the Lanham Act arising from infringement
6 and dilution by Ciuca and the Doe Defendants of Plaintiff’s federally registered trademark SPY
7 PHONE® and Google’s contribution to such infringement by knowingly and intentionally allowing
8 others to infringe on and dilute Plaintiff’s trademark in an online marketplace operated and controlled
9 by Google.

10 2. This action also asserts common law claims against all defendants for tortious
11 interference with contract and for tortious interference with Plaintiff’s prospective economic
12 advantage arising from defendants’ intentional, unfair and unlawful acts intended to harm Plaintiff’s
13 business relationships by, among other things, the submission of false complaints about Plaintiff and
14 its product, Plaintiff’s unjustified suspension from Google’s online marketplace in retaliation for
15 Plaintiff having submitted legitimate complaints against other developers, and Google’s refusal to
16 allow Plaintiff to use its federally registered trademark to identify its product anywhere in the world
17 while allowing other developers to use Plaintiff’s trademark in countries where the mark is not
18 registered.

19 3. Finally, this action assert claims against Google for breach of the implied
20 covenant of good faith and fair dealing in the parties’ agreement and violations of Cal. Bus. and Prof.
21 Code §§ 17200 *et seq* (also known as the California Unfair Competition Law or “UCL”) arising from
22 Google’s abuse of the discretion afforded to it under the parties’ agreement, which result in Plaintiff’s
23 product being removed by Google from Google’s online marketplace without any justification.

24 PARTIES

25 4. Plaintiff Spy Phone Labs LLC is a New Jersey limited liability company with
26 its principal place of business in Wayne, New Jersey.

27 5. Upon information and belief, defendant Google, Inc. is a Delaware
28 corporation with its principal place of business in Mountain View, California.

1 6. Upon information and belief, Ciuca, doing business as Cad Design, is a citizen
2 of Bucharest, Romania.

2 || of Bucharest, Romania.

7. Upon information and belief, the Doe Defendants are developers of software applications used for mobile phones who have infringed upon Plaintiff's federally registered trademark and/or taken action intended to interfere with Plaintiff's existing contracts and prospective business relations. Plaintiff does not know the true names or legal capacities of the Doe Defendants, and therefore sues these defendants under fictitious names until such time as they can be identified through discovery from Google.

4 | applications used for mobile phones who have infringed upon Plaintiff's federally registered

5 | trademark and/or taken action intended to interfere with Plaintiff's existing contracts and prospective

6 | business relations. Plaintiff does not know the true names or legal capacities of the Doe Defendants,

7 and therefore sues these defendants under fictitious names until such time as they can be identified

8 through discovery from Google.

9 JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 insofar as this action asserts claims arising under federal law, namely the Lanham Act. This Court has supplemental jurisdiction over state and common law claims pursuant to 28 U.S.C. § 1367.

11 U.S.C. § 1331 insofar as this action asserts claims arising under federal law, namely the Lanham Act.

12 This Court has supplemental jurisdiction over state and common law claims pursuant to 28 U.S.C. §

13 || 1367.

14 9. This Court has personal jurisdiction over all defendants in this action because
15 each either does business in the State of California and/or has sufficient minimum contacts with the
16 State of California such that maintaining this action in this Court will not offend traditional notions
17 of fair play and substantial justice.

15 each either does business in the State of California and/or has sufficient minimum contacts with the

16 || State of California such that maintaining this action in this Court will not offend traditional notions

17 of fair play and substantial justice.

18 10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a)
19 because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this
20 judicial district. Intradistrict assignment has already been determined in this transferred case.

19 because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this

20 judicial district. Intradistrict assignment has already been determined in this transferred case.

21 || FACTS ALLEGED

22 Google and Google Play

23 11. Rather than simply provide telephone service, today’s mobile “smart” phones
24 offer many features and can perform numerous functions. Some of these functions and features are
25 installed on the phone by the manufacturer, but many more can be added by the consumer based on
26 his or her needs and interests.

24 offer many features and can perform numerous functions. Some of these functions and features are

25 installed on the phone by the manufacturer, but many more can be added by the consumer based on

26 his or her needs and interests.

12. Functions and features can be added to a smart phone by installing or
downloading a software application, more commonly known as an “app.”

28 downloading a software application, more commonly known as an “app.”

1 13. Google owns and operates Google Play (or the “Store” or the “Market”), an
2 app distribution platform and online marketplace for smart phones and other electronic devices that
3 operate on the Android® operating system, the operating system installed on over 60% of all mobile
4 devices in use today.

5 14. Google Play enables owners and users of smart phones that operate on the
6 Android® operating system to download apps as well as other electronic media onto their phones.

7 15. Google Play also enables a consumer who downloads an app to post a rating
8 of one to five stars and to provide specific comments about his or her experience using the app.

9 16. Upon information and belief, more than 90% of all Android®-based apps that
10 are downloaded onto a mobile phone are downloaded through Google Play, making Google Play, far
11 and away, the most dominant and important marketplace for any developer of Android®-based apps.

12 17. The easiest and most common way for consumers to locate an app on Google
13 Play is by entering one or more words into Google Play’s search field, which, using an algorithm
14 developed and applied by Google, will generate a list that ranks the located apps in order of relevance.

15 18. Upon information and belief, the name (or title) and description of an app are
16 significant factors in determining the ranking of each app in response to a search for a specific word
17 or phrase.

18 19. Upon information and belief, the number and quality of consumer reviews that
19 are posted on Google Play are also significant factors in determining the ranking of each app in
20 response to a specific search for a word or phrase.

21 20. Apps that rank higher on the list for a particular search word or phrase are
22 more likely to be downloaded than lower ranking apps because these are the first apps that consumers
23 see and are likely the most relevant for the consumer.

24 21. An app developer who wishes to offer an app for download on Google Play is
25 required by Google to agree to abide by the terms and conditions mandated by Google, which are
26 incorporated into Google Play’s Developer Distribution Agreement (“DDA”). (A copy of the DDA
27 in effect as of August 2012, when first agreed to by Plaintiff, is attached hereto as Exhibit 1.)
28

22. Section 4 of the DDA describes the terms and conditions governing a developer's use of Google Play and includes, among other things, a prohibition against a developer from offering a product that: (a) interferes with, disrupts, damages or accesses in an unauthorized manner the device of any third party; and (b) does not adhere to any of Google Play's "Developer Program Policies."

23. Google Play's Developer Program Policies currently include or have included, among others, rules and policies that prohibits a developer from offering an app on Google Play that: (a) constitutes "spyware" because it collects information (such as the user's location or behavior) without the user's knowledge or consent; (b) impersonates other entities, brands, or otherwise infringes on intellectual property rights of others, including trademark and other proprietary rights; (c) "spams" users or the Store; and (d) offers the same function or service under different names.

24. In or about March 2016, Google Play added a new Developer Program Policy specifically applicable to apps that monitor or track a user's behavior and activity on a device, which requires that such apps: (a) must not present themselves as a spying or secret surveillance solution; (b) must not hide or cloak tracking behavior or attempt to mislead users about such functionality; (c) present users with a persistent notification and unique icon that clearly identifies the app on the device; and (d) do not provide any means to activate or access functionality that violate these terms (collectively, the "March 2016 Monitoring App Requirements").

25. Section 7.2 of the DDA provides for "takedowns" of apps by Google from Google Play if Google determines "in its sole discretion" that an app or other product offered by a developer violates, among other things, applicable law, the terms of the DDA or any of Google Play's Developer Program Policies.

26. At the time Plaintiff agreed to the terms of the DDA, § 7.2 of the DDA provided as follows:

Google Takedowns. While Google does not undertake an obligation to monitor the Products or their content, if Google is notified by you or otherwise becomes aware and determines in its sole discretion that a Product or any portion thereof or your Brand Features; (a) violates the intellectual property rights or any other rights of any third party; (b) violates any applicable law or is subject to an injunction; (c) is pornographic, obscene or otherwise violates Google's hosting policies or other terms of service as may be updated by Google from time to time in its sole discretion; (d) is being distributed by you improperly; (e) may create liability for Google or Authorized

Carriers; (f) is deemed by Google to have a virus or is deemed to be malware, spyware or have an adverse impact on Google's or an Authorized Carrier's network; (g) violates the terms of this Agreement or the Developer Program Policies for Developers; or (h) the display of the Product is impacting the integrity of Google servers (i.e., users are unable to access such content or otherwise experience difficulty), Google may remove the Product from the Market or reclassify the Product at its sole discretion. Google reserves the right to suspend and/or bar any Developer from the Market at its sole discretion.

Google enters into distribution agreements with device manufacturers and Authorized Carriers to place the Market software client application for the Market on Devices. These distribution agreements may require the involuntary removal of Products in violation of the Device manufacturer's or Authorized Carrier's terms of service.

In the event that your Product is involuntarily removed because it is defective, malicious, infringes intellectual property rights of another person, defames, violates a third party's right of publicity or privacy, or does not comply with applicable law, and an end user purchased such Product within a year before the date of takedown,: (i) you must refund to Google, all amounts received, plus any associated fees (i.e. chargebacks and payment transaction fees), and (ii) Google may, at its sole discretion, withhold from your future sales the amount in subsection (i) above.

(Exhibit 1, ¶ 7.2)

27. In the current version of the DDA, which was most recently updated in May 2015, § 7.2 of the DDA currently provides as follows (underlines and strikethroughs show changes):

Google Takedowns. While Google does not undertake an obligation to monitor the Products or their content, if Google is notified by you or otherwise becomes aware and determines in its sole discretion that a Product or any portion thereof or your Brand Features; (a) violates the intellectual property rights or any other rights of any third party; (b) violates any applicable law or is subject to an injunction; (c) is pornographic, obscene or otherwise violates Google's hosting policies or other terms of service as may be updated by Google from time to time in its sole discretion; (d) is being distributed by you improperly; (e) may create liability for Google or Authorized Carriers; (f) is deemed by Google to have a virus or is deemed to be malware, spyware or have an adverse impact on Google's or an Authorized Carrier's network; (g) violates the terms of this Agreement or the Developer Program Policies for Developers; or (h) the display of the Product is impacting the integrity of Google servers (i.e., users are unable to access such content or otherwise experience difficulty), Google may remove the Product from the ~~MarketStore~~ or reclassify the Product at its sole discretion. Google reserves the right to suspend and/or bar any Developer from the ~~MarketStore~~ at its sole discretion. If your Product contains elements that 7.2 could cause serious harm to user devices or data, Google may at its discretion disable the Product or remove it from devices on which it has been installed. Google may suspend or terminate distribution of your Products if you materially breach the terms of any non-disclosure agreement or other agreement relating to the Store or the Android platform.

Google enters into distribution agreements with device manufacturers and Authorized Carriers to place the ~~MarketStore~~ software client application for the ~~MarketStore~~ on Devices. These distribution agreements may require the involuntary removal of

1 Products in violation of the Device manufacturer's or Authorized Carrier's terms of
2 service.

3 In the event that your Product is involuntarily removed because it is defective,
4 malicious, infringes intellectual property rights of another person, defames, violates a
5 third party's right of publicity or privacy, or does not comply with applicable law, and
6 an end user purchased such Product within a year before the date of takedown,: (i)
you must refund to Google, all amounts received, plus any associated fees (i.e.
chargebacks and payment transaction fees), and (ii) Google may, at its sole discretion,
withhold from your future sales the amount in subsection (i) above.

7 28. While the DDA provides that Google “does not undertake an obligation to
8 monitor” the products and apps offered by a developer on Google Play or the content of such products
9 and apps, Google does, in fact, regularly and routinely conduct independent monitoring of the apps
10 listed on Google Play to ensure compliance with the DDA and Google Play’s Developer Program
11 Policies.

12 29. This monitoring and investigation of apps is performed by a group of Google
13 employees known as the “Google Play Team.”

14 30. In addition, since at least January 2015, the monitoring and investigation by
15 the Google Play Team includes “human reviews” of each new app to ensure compliance with Google
16 Play’s Developer Program Policies before the app is listed in the Store.

17 31. In addition to independently monitoring apps listed in Google Play, the
18 Google Play Team investigates specific complaints lodged against a particularly app or developer.

19 32. The Google Play Team also determines what action, if any, should be taken in
20 response to a complaint about an app or developer.

21 33. Before an app can be listed on Google Play, the developer must incorporate
22 source code provided by Google that enables the apps to access and interact with a phone’s Android®
23 operating system.

24 34. In this respect, Google provide a portion of the content for all apps listed on
25 Google Play.

26 35. When an app is listed on Google Play, it is available to all consumers in all
27 countries throughout the world with access to the Internet unless the developer expressly restricts the
28 availability of the app to certain countries.

36. Currently, approximately 86.5% of all apps classified by Google as “tools” – which is the category in which the app that is the subject matter of this action belongs – are downloaded by consumers located outside of the U.S., while the remaining 13.5% of tool apps are downloaded by consumers located within the U.S.

Plaintiff’s Trademark, Domain Name and App

37. Plaintiff is the owner of the registered U.S. trademark SPY PHONE®, Registration Number 3948486, for computer application software for mobile phones in International Class 09, first used in commerce on September 1, 2010.

38. After July 2013, Plaintiff’s SPY PHONE® trademark was also registered in Turkey, Mexico, South Korea and Australia under International Registration Number 1169007.

39. Plaintiff sought to register its trademark in other countries, including those included within the European Union, but those registrations were denied.

40. Plaintiff also owns the domain name <spyphone.com>.

41. Plaintiff is the developer of an app that can be downloaded on a mobile phone that operates on the Android® operating system (“Plaintiff’s App”).

42. Plaintiff’s App is what it commonly known as a “monitoring app.”

43. When downloaded on a mobile phone, Plaintiff’s App allows the user or an authorized third party to monitor or track a user’s behavior and activity, including the location of the phone through GPS tracking, the telephone number of the sender or recipient of incoming and outgoing messages, the content of messages and Internet usage.

44. Monitoring apps such as Plaintiff’s App are particularly useful on phones used by minors because it allows the minor’s parent or guardian to track the child’s activities and location.

45. The information obtained from a mobile phone by Plaintiff’s App is transmitted from the mobile phone to a secure server maintained by Plaintiff, and can be accessed only through a private account established via a website operated by Plaintiff that is associated with Plaintiff’s domain name <spyphone.com>.

46. To ensure compliance with Google’s Play’s anti-spam policy, the data obtained from a mobile phone is not sent to any other device and can only be viewed through the

1 private account on Plaintiff's secure server established by the person who downloaded Plaintiff's
2 App on the mobile device.

3 47. To ensure compliance with Google's anti-spyware policy and protect against
4 Plaintiff's App being misused by someone attempting to obtain information from a mobile device
5 without the owner's knowledge, Plaintiff's App causes a unique icon to periodically appear on the
6 mobile device on which Plaintiff's App is downloaded, which notifies the user that Plaintiff's App
7 has been installed on that mobile device.

8 48. Although the specific requirements contained in the March 2016 Monitoring
9 App Requirements were not promulgated by Google until just recently, Plaintiff's App has complied
10 with all of the March 2016 Monitoring App Requirements since at least June 2013.

11 49. Plaintiff's App is free to download, but generates revenue through advertise-
12 ments placed on the website associated with <spyphone.com> through a program operated by Google
13 known as AdSense®.

14 50. Google's AdSense® program enables website owners, such as Plaintiff, to
15 earn revenue from advertisers who bid for the right to place advertisements on a website through an
16 auction process operated by Google. The advertiser with the highest bid earns the right to post an
17 advertisement on the website.

18 51. Since the amount that an advertiser is willing to pay is driven primarily by the
19 number of people who may potentially view an advertisement, the amount of advertising revenue
20 earned under Google's AdSense® program is determined primarily by the amount of traffic that is
21 driven to a particular website.

22 52. Thus, in the case of the website associated with Plaintiff's <spyphone.com>
23 domain name, the more people who download Plaintiff's App, the more people who will need to visit
24 Plaintiff's website to view the information sent to their private accounts, and the more money
25 advertisers will pay to advertise on Plaintiff's website, which means more revenue generated by from
26 Plaintiff's App.

27 ///

28 ///

1 53. From April 2013 through December 2015, during which time Plaintiff
2 maintained two paid advertisements on its website, Plaintiff earned an average of 45¢ in revenue
3 through the AdSense® program for each download of Plaintiff's App on Google Play.

4 54. From December 2015 to date, during which time Defendant has maintained
5 only one paid advertisement on its website, Plaintiff earned an average of 22.5¢ in revenue through
6 the AdSense® program for each download of Plaintiff's App on Google Play.

7 55. At all relevant times herein, all defendants had knowledge of Plaintiff's
8 participation in Google's AdSense® program.

9 56. Upon information and belief, Google operates the AdSense® program through
10 a business unit that is separate and independent from the business unit responsible for Google Play
11 and that employs the Google Play Team.

12
13 Plaintiff's App Is Listed on Google Play Under the SPY PHONE® Brand Name

14 57. In or around August 2012, Plaintiff established a developer account for
15 Google Play.

16 58. As part of establishing its developer account, Plaintiff and Google agreed to
17 be bound by the terms of the DDA, which is a valid and binding agreement between Plaintiff and
18 Google.

19 59. At the time Plaintiff established its developer account and at all relevant times
20 since then, there have been dozens of monitoring apps created by different developers listed for
21 download on Google Play that perform the same or similar functions as Plaintiff's App.

22 60. After establishing its developer account, Plaintiff initially listed Plaintiff's
23 App for download under the name "SPY PHONE® Phone Tracker," which corresponded with
24 Plaintiff's federally registered trademark.

25 61. By obtaining a trademark registration for the name SPY PHONE®, Plaintiff
26 sought to identify distinguish its monitoring app from similar apps offered by other developers, while
27 preventing other developers from copying or infringing upon its trademarked name, which Plaintiff
28 expected would provide Plaintiff's App with a competitive advantage over other monitoring apps.

1 At its peak about 8000 apps a day were downloaded under the Spy Phone® trademark, making it
 2 believed to be based upon public reporting one of the highest downloaded tools apps worldwide in
 3 the Google Play store

4 62. Between August 2012 and June 2013, Plaintiff's App, under the brand SPY
 5 PHONE® was one of the most popular apps downloaded from Google Play, with over 1.1 million
 6 downloads.

7 63. The popularity of Plaintiff's App on Google Play resulted in increased traffic
 8 at Plaintiff's <spyphone.com> website, which elevated the price that advertisers were willing to pay
 9 to advertise on Plaintiff's website, and which, in turn, together with the added traffic, increased
 10 Plaintiff's advertising revenues.

11
 12 Plaintiff's Attempts To Enforce Its Trademark Rights

13 64. If the holder of a registered trademark discovers that an app or other product
 14 listed on Google Play is infringing on its trademark, under Google's policies, the trademark holder
 15 can submit an online complaint to the Google Play Team requesting that the infringing app be
 16 removed from the Store for violating the trademark infringement policy contained in Google Play's
 17 Developer Program Policies.

18 65. Upon receipt of a trademark infringement complaint, under Google's policies,
 19 one or more members of the Google Play Team will review it and, if determined to be valid, the
 20 Google Play Team will take down the infringing app from the Store, but only in the countries where
 21 the trademark is registered.

22 66. Thus, for example, if, in response to a trademark complaint, the Google Play
 23 Team takes down an app that infringes upon a U.S. trademark, consumers in the U.S. will be not be
 24 able to view or download the infringing app from the version of Google Play available in the U.S.
 25 ("Google Play U.S."), but consumers outside of the U.S. (who are responsible for downloading over
 26 86% of all the tool apps downloaded from Google Play) will still be able to view and download the
 27 infringing app.

1 67. Upon removal of an infringing app from the Store in response to a complaint
2 from a trademark holder, the Google Play Team sends a notice to the developer of the infringing app
3 stating, among other things, why its app has been removed from Google Play, together with the
4 identity of the trademark that has been infringed and the name and email address of the person or
5 party who filed the infringement complaint.

6 68. Starting in or around November 2012, Plaintiff discovered that other
7 developers, including some of the Doe Defendants, were attempting to trade on the success and
8 reputation of Plaintiff's App by offering apps for download on Google Play under names that copied
9 or incorporated Plaintiff's registered SPY PHONE® trademark and that performed the same or
10 similar functions as Plaintiff's App.

11 69. In response to the other developers' infringement upon its SPY PHONE®
12 trademark on Google Play, Plaintiff submitted trademark infringement complaints against these
13 developers to the Google Play Team using Google Play's online complaint form.

14 70. Upon information and belief, the same employee or small group of employees
15 on the Google Play Team were responsible for handling all of the trademark infringement complaints
16 relating to Plaintiff's Spy Phone® trademark and/or monitoring apps and, therefore, Google was
17 specifically aware of all Plaintiff's efforts to enforce its trademark rights.

18 71. From approximately November 2012 through May 2013, in response to
19 Plaintiff's trademark complaints, Google removed apps listed on Google Play U.S. under names that
20 either copied Plaintiff's trademark verbatim, or incorporated Plaintiff's trademark in the name,
21 including: (a) "Galyum Spy Phone;" (b) "Spy Phone Camera"; and (c) "Spy Phone Android."

22 72. These takedowns were effective only with respect to Google Play U.S. In
23 other words, consumers outside the U.S. who could access Google Play were still able to view and
24 download the infringing apps.

25 73. In addition to removing the infringing app from the Store, § 7.2 of the DDA
26 also authorizes Google, in its sole discretion, to suspend and/or bar any developer from the Store
27 who violates any of the terms of the DDA or any of Google Play's Developer Program Policies.
28

1 74. Upon information and belief, none of the developers whose apps were
2 removed from the Store in response to Plaintiff's trademark infringement complaints in 2012 and
3 2013 were barred from Google Play or had their developer account suspended.

4
5 Without Warning, Google Removes Plaintiff's App From
6 Google Play and Terminates Its Developer Account Without Cause

7 75. In or around May 17, 2013, Plaintiff filed a complaint using Google's online
8 trademark infringement complaint form against a developer doing business under the name Cad
9 Design, which had listed a monitoring app on Google Play under the name "Spy Phone App."

10 76. Despite actual notice of direct infringement of Plaintiff's Spy Phone®
11 trademark on May 17, 2013, Google took no action to stop this infringement by Cad Design until on
12 or about June 13, 2013, 27 days later.

13 77. On or about June 13, 2013, the Google Play Team took down Cad Design's
14 infringing app from Google Play U.S. in response to Plaintiff's claim of trademark infringement.

15 78. Upon information and belief, the Google Play Team sent Cad Design a
16 takedown notice identifying Plaintiff as the complaining party.

17 79. On June 13, 2013, Plaintiff received an email from defendant Ciuca, who
18 identified himself as an app developer doing business on Google Play under the name Cad Design.

19 80. Ciuca's email complained that his monitoring app had been removed from
20 Google Play as a result of a complaint filed by Plaintiff and asked for an explanation.

21 81. Plaintiff responded by email that the name Ciuca was using for his app
22 infringed on Plaintiff's SPY PHONE® trademark, and that if Ciuca wanted to offer a monitoring app
23 to U.S. consumers on Google Play, he must do so under a name that does not infringe on Plaintiff's
24 SPY PHONE® trademark.

25 82. Almost immediately following this exchange of emails, Google started taking
26 actions to prevent Plaintiff from exercising and enforcing its trademark rights as well as other actions
27 that had an adverse effect on Plaintiff's business, as described further below.
28

1 83. Although Plaintiff did not realize it at the time, Plaintiff now believes that the
2 actions were orchestrated by Ciuca, members of the Google Play Team and possibly other Doe
3 Defendants acting in concert against Plaintiff as a result of the success of Plaintiff's App.

4 84. On or about June 24, 2013, Plaintiff submitted an online trademark complaint
5 form to Google against a developer who had listed a parental monitoring app on Google Play named
6 "Reptilicus.net Brutal Spy Phone."

7 85. Although the Google Play Team had previously taken down apps with
8 similarly infringing names – such "Galyum Spy Phone" – in response to Plaintiff's trademark
9 complaints, the Google Play Team informed Plaintiff that, this time, Google would take no action,
10 stating:

11 As a preliminary matter, please note that Google is not in a position to mediate
12 trademark disputes between developers and trademark owners. As a courtesy we have
13 considered your claim, but are unable to determine its merits at this time.

14 86. On June 28, 2013, the Google Play Team sent Plaintiff a notice stating that, in
15 response to a complaint that it had received about Plaintiff's App, Plaintiff's App had been removed
16 from Google Play and Plaintiff's developer account had been terminated.

17 87. The reason given by the Google Play Team for the removal of Plaintiff's App
18 from Google Play was that it violated Google's anti-spyware policy.

19 88. Plaintiff was not provided with a copy of the complaint that was supposedly
20 filed nor the identity of the complaining party.

21 89. Plaintiff was given no prior notice, warning or opportunity to correct any
22 alleged problems with Plaintiff's App before the takedown and termination of its developer account.

23 90. At the time of Plaintiff's App was removed from Google Play and its
24 developer account was terminated, Plaintiff was in full compliance with all terms and conditions of
25 the DDA.

26 91. At the time of Plaintiff's App was removed from Google Play and its
27 developer account was terminated, Plaintiff's App complied in all respects with Google Play's extant
28 Developer Program Policies, including its anti-spyware policy.

1 92. The alleged complaint asserting that Plaintiff's App violated Google Play's
2 Developer Program Policies was false and was known by the members of the Google Play Team who
3 reviewed the complaint to be false.

4 93. Upon information and belief, the false complaint that led to the removal of
5 Plaintiff's App from Google Play was submitted by or at the behest of Ciuca, one or more of the Doe
6 Defendants and/or one or more members of the Google Play Team, who were retaliating against
7 Plaintiff for filing trademark infringements complaints against competing apps and/or sought to
8 eliminate Plaintiff as a competitor.

9 94. Although unknown to Plaintiff at the time of the June 2013 takedown and
10 termination, Plaintiff subsequently learned (as described below) that Google and its employees on
11 the Google Play Team knew that there was no real justification to take down Plaintiff's App from
12 the Store or the termination of Plaintiff's developer account.

13 Google Eventually Agrees to Reinstate Plaintiff's Developer Account and Plaintiff's App, But
14 Only After Plaintiff Is Compelled to Stop Using Its Registered Trademark

15 95. At the time Plaintiff's developer account was terminated in June 2013, Google
16 Play permitted a developer whose account was terminated to submit an online appeal explaining in
17 500 words or less why the developer believed that its termination was unjustified.

18 96. Under Google's appeal procedure, a developer may not view any of the
19 complaints that have been filed against it, may not speak to a live person, and may not submit any
20 supporting information beyond the 500-word explanation.

21 97. Plaintiff submitted an appeal in compliance with Google Play's online appeals
22 procedure.

23 98. Google denied Plaintiff's online appeal and refused to reinstate Plaintiff's
24 developer account without providing Plaintiff an explanation.

25 99. Following the denial of its online appeal, Plaintiff filed a lawsuit against
26 Google in New Jersey federal court demanding reinstatement of Plaintiff's App and Plaintiff's
27 developer account (the "First Lawsuit").
28

100. After Plaintiff filed the First Lawsuit, its counsel was able to speak to a live person employed by Google (an in-house lawyer), and requested an explanation as to the reasons for the takedown of Plaintiff's App and the termination of Plaintiff's developer account.

101. After numerous back-and-forth communications between Plaintiff's counsel and Google's in-house lawyer, the Google Play Team finally acknowledged that none of the functions or features of Plaintiff's App violated Google's extant anti-spyware policy or any of Google's other Developer Program Policies.

102. Nonetheless, Google still refused to reinstate Plaintiff's App because, according to the Google Play Team, Plaintiff's use of its registered trademark SPY PHONE® to identify Plaintiff's App violated the extant anti-spyware policy:

. . . While providing additional disclosure in the app description and regular notification to targeted phones are crucial steps to accomplishing policy compliance, the Google Play Team believes the app is still in violation of policy because of the app's title. App titles should not be misleading or represent the product as being spyware and/or capable of surreptitious tracking [emphasis added]. . . .

(A copy of the email from the Google Play Team, dated September 20, 2013, provided by Google's in-house counsel, is attached as Exhibit 2.)

103. Plaintiff's counsel responded by email, observing that not only does Plaintiff have a federally registered trademark for the brand name SPY PHONE®, there were currently dozens of other apps listed on Google Play performing similar functions as Plaintiff's App that contained the word "spy" in the title against which no action was being taken and that Plaintiff was being unfairly singled out as compared to other developers:

We do not understand Google Play's concern over the name of my client's app when there are dozens of other apps that perform the same or a similar function on Google Play that use the word "spy" in its name, including several that use my client's trademarked phrase "spy phone." I invite you to do to as I did just a few minutes ago and enter the phrase "spy phone" into the Google Play search bar and you will see what I mean.

104. In response, Google's in-house stated that the Google Play Team had informed her that, going forward, the Google Play Team intended to prohibit all developers from using the

word “spy” in the title an app listed on Google Play, and stated definitively that Plaintiff must stop using its SPY PHONE® trademark if Plaintiff wanted to have Plaintiff’s App listed on Google Play anywhere in the world.

105. Given the options of not being permitted to list Plaintiff’s App on Google Play (from which over 90% of all Android®-based apps are downloaded) or no longer being able to list Plaintiff’s App under the SPY PHONE® trademarked brand, Plaintiff was compelled to capitulate to Google’s demand and discontinue use of its SPY PHONE® trademark to identify Plaintiff’s App.

106. At the same time, based on Google’s representation that no developers were going to be permitted to use the word “spy” in the title of an app, Plaintiff believed that the harm to its business resulting from not being able to use its SPY PHONE® to identify Plaintiff’s App on Google Play would be diminished because there would effectively be a level playing field.

107. Plaintiff also relied on Google’s representation that all developers were going to be prohibited from using the word “spy” in the title of an app in agreeing to dismiss the First Lawsuit without prejudice.

While Plaintiff was Forced To Change the Name of Plaintiff’s App, Other Developers
Were Allowed To Operate as Usual and Use Plaintiff’s Trademark Worldwide

108. In or about October 2013, Google reinstated Plaintiff’s developer account, but only after deleting the content relating to all versions of Plaintiff’s App, including all the consumer reviews and records of downloads for Plaintiff’s App appearing under the brand name SPY PHONE®, which had previously contributed to Plaintiff’s App achieving a top ranking on Google Play and the concomitant financial benefit.

109. Plaintiff objected to the deletion of the customer reviews for Plaintiff’s App, but Google refused to reinstate those reviews.

110. Soon after its developer account was reinstated, Plaintiff began offering Plaintiff’s App for download on Google Play under the name “Phone Tracker.”

111. For the ten-month period between October 2013 and July 2014, the number of downloads for Plaintiff’s App under the name “Phone Tracker” plummeted to approximately

1 260,000, as compared to more than 1.1 million for the ten-month period between August 2012 and
2 June 2013 when Plaintiff's App had offered Plaintiff's App under the SPY PHONE® brand.

3 112. To this day, as compared to the monthly rate of downloads for Plaintiff's App
4 when listed on Google Play under the trademarked name SPY PHONE®, Plaintiff has never achieved
5 anything close to the same number of downloads for Plaintiff's App under the name Phone Tracker.

6 113. The steep reduction in the number of downloads resulted in a steep reduction
7 in Plaintiff's advertising revenue through Google's AdSense® program.

8 114. Meanwhile, contrary to Google's representation that it was instituting a policy
9 to prevent all developers from using the word "spy" in the title of an app listed on Google Play –
10 which necessarily would also have prevented developers from using names that infringed on
11 Plaintiff's SPY PHONE® trademark – dozens and dozens of other developers, including Ciuca and
12 the Doe Defendants, continue to list monitoring and other apps on Google Play under titles that
13 contained the word "spy."

14 115. Google's practice of allowing apps with the word "spy" in the title has
15 continued even with respect to new apps listed after January 2015, despite the fact that, since at least
16 January 2015, all new apps are subject to a "human review" to ensure compliance with all of Google
17 Play's extant Developer Program Policies.

18 116. Many of the monitoring apps listed on Google Play that used the word "spy"
19 in the name after Google supposedly established a policy to prohibit developers from being permitted
20 to use the word "spy" in the title of an app have actually copied or incorporated verbatim Plaintiff's
21 SPY PHONE® trademark.

22 117. While the full list can only be obtained through discovery, the following is a
23 partial list of the apps that have been listed on Google Play since Google supposedly established a
24 policy to prohibit developers from being permitted to use the word "spy" in the title of an app: (a)
25 "Phone Spy: Call, SMS"; (b) "Ear Spy"; (c) "Phone Spy: GPS, SMS"; (d) "CPU Spy"; (e) "Spy
26 Message"; (f) "Cell Spy"; and (g) "Spy Camera."

27 118. While the full list can only be obtained through discovery, the following is a
28 partial list of additional apps that contain the word "spy" in the title and which were first made

1 available for download on Google Play after January 2015, the date from which all new apps listed
2 on Google Play have supposedly been subject to a “human review” to ensure compliance with all of
3 Google Play’s extant Developer Program Policies: (a) “spyphone on your phone” (b) “spy secret
4 video camera”; (c) “Drone Spy”; (d) “Domain Spy”; (e) “Phone Spy simulated”; and (f) “Spy mobile
5 prank,” which uses “Spy Phone” as its logo.

6 119. While the full list can only be obtained through discovery, the following is a
7 partial list of the apps made available for download on Google Play since October 2013, when Google
8 supposedly established a policy to prohibit developers from being permitted to use the word “spy”
9 in the title, with titles that actually copied or incorporated verbatim Plaintiff’s SPY PHONE®
10 trademark: (a) “Spy Phone”; (b) “SpyPhone 1.0”; and (c) “spyphone on your phone”.

11 120. Notably, even if Plaintiff had submitted online trademark complaints to the
12 Google Play Team about an app that actually copied verbatim Plaintiff’s SPY PHONE® trademark
13 and those complaints were deemed valid, Google would only take down those apps in the countries
14 where Plaintiff’s trademark is registered – the U.S. and, after July 2013, Turkey, Mexico, South
15 Korea and Australia.

16 121. In other words, while Plaintiff, since October 2013, has been prohibited from
17 using its SPY PHONE® trademark on Google Play worldwide due to Google having forced Plaintiff
18 to stop using its mark as a condition for the reinstatement of Plaintiff’s developer account, other
19 developers not subject to the same restriction can list their apps under the name “spy phone” in
20 countries where Plaintiff’s trademark is not registered, and Plaintiff cannot stop it by filing a
21 trademark complaint.

22 122. For example, while Google has previously removed “SpyPhone 1.0” from
23 Google Play U.S. in response to Plaintiff’s complaint that this app infringed on its trademark, that
24 exact same app is available on the version of Google Play accessible to consumers in the United
25 Kingdom, where it currently appears as the top-ranked app for a search of the phrase “spy phone,”
26 while Plaintiff’s App, which Plaintiff has listed as Phone Tracker because Google has prohibited
27 Plaintiff from using its trademark SPY PHONE® on Google Play worldwide, is currently ranked
28 sixth for the same search. (A copy of a screen shot, taken on April 7, 2016, for the results of a search

1 conducted for the phrase “spy phone” on the version of Google Play accessible in the United
2 Kingdom, is attached as Exhibit 3.)

3 123. Through the Google Play Team’s “human review” of new apps, its
4 independent monitoring of existing apps on Google Play and its investigation of complaints, Google
5 is and has been aware that, since at least January 2015, apps have been listed on Google Play using
6 the word “spy” in the title even though Google supposedly established a policy to prohibit such
7 practice.

8 124. Upon information and belief, Plaintiff was and is the only app developer who
9 has ever been subjected to Google’s supposed policy prohibiting developers from using the word
10 “spy” in the title of an app listed on Google Play and the only developer against whom this supposed
11 policy has been made a condition of maintaining a developer account.

12
13 Plaintiff’s Additional Complaints Lead To a Second Suspension From Google Play

14 125. After realizing that Google did not actually have or was not enforcing its
15 supposed policy prohibiting developers from using the word “spy” in the title of an app listed on
16 Google Play (except as it applied to Plaintiff), starting in or around January 2014, Plaintiff began
17 submitting complaints to Google about certain apps that were using the word “spy” in the title,
18 asserting that these apps were violating the anti-spyware policy in Google Play’s extant Developer
19 Program Policies.

20 126. In response to these complaints, Google removed some apps from Google
21 Play, but other apps with the word “spy” in their title were not taken down by the Google Play Team.

22 127. Upon information and belief, none of the developers whose apps were taken
23 down in response to Plaintiff’s spyware complaints had their developer accounts suspended or
24 terminated.

25 128. Further, in many instances, apps that were taken down as a result of Plaintiff’s
26 complaints were re-listed in Google Play by the developer after the takedown.

1 129. On July 2 and 10, 2014, Plaintiff's representative submitted complaints to the
2 Google Play Team against a monitoring app listed on Google Play that used the word "spy" in its
3 title.

4 130. Upon information and belief, the developer of the app about which these
5 complaints were lodged was Ciuca, the same developer against whom Plaintiff had submitted a
6 trademark infringement complaint shortly before Plaintiff's developer account was terminated in
7 June 2013.

8 131. On or around July 16, 2014, Plaintiff was notified by the Google Play Team
9 that its developer account was being suspended and that Plaintiff's App had been removed from
10 Google Play for violation of the "spam" policy contained in Google Play's Developer Program
11 Policies.

12 132. Plaintiff was not provided with a copy of the complaint that was supposedly
13 filed nor the identity of the complaining party.

14 133. Plaintiff was given no prior notice, warning or opportunity to correct any
15 alleged problems with Plaintiff's App before the takedown and suspension of its developer account.

16 134. At the time Plaintiff's App was removed from Google Play and its developer
17 account was suspended, Plaintiff was in full compliance with all terms and conditions of the DDA.

18 135. At the time of Plaintiff's App was removed from Google Play and its
19 developer account was suspended, Plaintiff's App complied in all respects with Google Play's extant
20 Developer Program Policies, including the anti-spam policy.

21 136. The alleged complaint asserting that Plaintiff's App violated Google Play's
22 Developer Program Policies was false and was known by the members of the Google Play Team who
23 reviewed the complaint to be false.

24 137. Upon information and belief, the false complaint that led to the removal of
25 Plaintiff's App from Google Play was submitted by or at the behest of Ciuca, one or more of the Doe
26 Defendants and/or members of the Google Play Team, who sought to retaliate against Plaintiff for
27 filing anti-spyware complaints against competing apps and/or sought to remove Plaintiff as a
28 competitor.

1 138. Shortly after Plaintiff's suspension, as if to demonstrate his ability to act with
2 impunity, Ciuca listed a monitoring app in Google Play under the name "Spy Phone App Parental
3 Control," which incorporates and infringes upon Plaintiff's SPY PHONE® trademark.

4 139. At or around the same time that Ciuca listed "Spy Phone App Parental
5 Control" on Google Play, Ciuca also listed four other monitoring apps for download on Google Play
6 under four different aliases: (a) "Mobile tracker Whatsapp tracer"; (b) "Cell Phone tracker spy"; (c)
7 "Cell tracker | Phone tracer"; and (d) "GPS tracker Family finder."

8 140. Ciuca's connection to each of those parental monitoring apps is established by
9 the fact that each of the domain names for the websites associated with those apps is registered to
10 Ciuca, according to the "Who Is" domain registration directory.

11 141. It was a violation of Google Play's extant Developer Program Policies for a
12 developer to list multiple apps of Google Play that perform the same function under different names.

13 142. The Google Play Team took no action against Ciuca for listing multiple apps
14 that perform the same function under different names.

15 143. Following the removal of Plaintiff's App for supposedly violating Google
16 Play's anti-spam policy, to test whether the anti-spam policy was being applied uniformly to all
17 developers, Plaintiff lodged complaints using Google's online form against other monitoring apps
18 that were transmitting and collecting data in the same manner as Plaintiff's App.

19 144. The Google Play Team took no action against the other monitoring apps
20 against which complaints were filed and those apps remained available for download on Google Play.

21
22 Plaintiff Receives a Letter Confirming Its Suspicions That
23 Google's Actions Against It Were Taken Knowingly and In Bad Faith

24 145. Given that Plaintiff's App was taken down and his developer account was
25 suspended or terminated twice within days of lodging complaints against apps listed on Google Play
26 by Ciuca, Plaintiff suspected that Ciuca or some outside motivation or interest somehow exerted
27 influence over one or more members of the Google Play Team, but lacked any concrete evidence.

1 146. Then, approximately a month after its developer account was suspended in
 2 July 2014, Plaintiff received an anonymous letter in the mail from a “Concerned Google Play
 3 Member” who confirmed Plaintiff’s suspicions that members of the Google Play Team gave
 4 preferential treatment to certain app developers. (A copy of the anonymous letter received by
 5 Plaintiff is attached hereto as Exhibit 4.)

6 147. The author of the letter confirmed Plaintiff’s belief that “there was no real
 7 justification” for the adverse actions taken against Plaintiff in 2013 and 2014, and that Plaintiff was
 8 being singled out for unfair treatment in retaliation for its success and for filing complaints seeking
 9 to enforce its rights in the SPY PHONE® trademark:

To Spy Phone Labs management;

I am uneasy with treatment of your company by other Google Play team members. I
 want to share with you the reasons.

When you put in those Trademark Takedown notices you beacame [sic] a pariah
 around here. A small company like you should have known better than to send those
 notices in as you angered many people. Small companies like yours are not supposed
 to be wasting our time with your trademark notices.

We all thought you were gone last year but we did not anticipate you filing a lawsuit
 last year as everyone else we get rid of goes away quietly.

The only reason you were brought back was that there was no real justification to get
 rid of you. They did not want thaT TO COME OUT [sic]. They just made the excuse
 up that you were using the spyphone name as they needed a cover for thier [sic]
 actions. There is no formal policy against [sic] using spyphone except against your
 company.

Many of the people in the store enchance [sic] their income by making their own apps
 or helping out other apps in the store. The problem you have is that your app is
 sucessfull [sic] and it costs those apps money and downloads.

When you sent in your last takedown noticeyou [sic] needed to be taken out. They
 just got someone to send in a complaint against your app and then you are instantly
 gone. Someone needs to do something or things will just get worse.

Concerned Google Play Member

(Exhibit 4.)

148. The letter that Plaintiff received establishes that Plaintiff’s SPY PHONE®
 trademark, and Plaintiff’s efforts to enforce its U.S. trademark rights, were well-known to members
 of the Google Play Team.

149. The letter that Plaintiff received establishes that Google had specific knowledge of the activities of Ciuca and the Doe Defendants, including the filing of false complaints and Ciuca listing the infringing app “Spy Phone App Parental Control” in the Store shortly after Plaintiff’s App was taken down and Plaintiff’s developer account was suspended in July 2014.

150. The letter that Plaintiff received establishes that Google was specifically aware (or was willfully blind to the fact) that other developers were listing apps in Google Play U.S. that infringed upon Plaintiff’s SPY PHONE® trademark, but Google took no action to take down those infringing apps.

151. The letter that Plaintiff received establishes that the Google Play Team had had no justification for taking down Plaintiff’s App for violating Google Play’s Developer Program Policies and that Google acted in bad faith and abused its discretion under the DDA in taking down Plaintiff’s App.

Google’s Actions After This Lawsuit Was Filed Further Demonstrate Its Complicity
In and Acquiescence To Other Developers’ Infringement of Plaintiff’s Trademark

152. Plaintiff commenced this action in the United States District Court for the District of New Jersey on or about October 22, 2014.

153. On or about January 23, 2015, Plaintiff filed an amended complaint, which was served on Google’s counsel via the ECF system that same date.

154. The amended complaint (at ¶ 120) identified a monitoring app that was then available for download on Google Play U.S. under the name “SpyPhone 1.0” as an app that was actually infringing on Plaintiff’s Spy Phone® trademark.

155. Despite actual notice of direct infringement of Plaintiff’s Spy Phone® trademark on January 23, 2015, Google took no action stop “SpyPhone 1.0” from infringing on Plaintiff’s mark in the U.S. or the other countries where Plaintiff’s mark was registered until on or about February 10, 2015, 18 days after Google first received notice.

156. On or about February 10, 2015, the Google Play Team sent Plaintiff’s representative a notice stating that SpyPhone 1.0 had been taken down from Google Play within the jurisdictions in which plaintiff had registered its SPY PHONE® trademark in response to Plaintiff’s

1 assertion of trademark infringement in the amended complaint. (A copy of the notice received from
2 the Google Play Team is attached as Exhibit 5.)

3 157. On February 17, 2015, Plaintiff's representative received another notice from
4 the Google Play Team stating that a monitoring app listed for download on Google Play by a
5 developer named Maco under the name "Spy Phone 2" had been removed from Google Play in the
6 jurisdictions where Plaintiff's Spy Phone® trademark is registered. (A copy of the notice received
7 from the Google Play Team is attached as Exhibit 6.)

8 158. Prior to this takedown by the Google Play Team, Plaintiff had not identified
9 "Spy Phone 2" in its amended complaint, nor had Plaintiff lodged an online trademark complaint
10 with Google requesting a takedown of the "Spy Phone 2" app.

11 159. On Google's motion, this action was transferred from the United States
12 District Court for the District of New Jersey to this Court on August 13, 2015.

13 160. After transfer, Google moved to dismiss the amended complaint.

14 161. On March 21, 2016, this Court granted Google's motion to dismiss, but
15 granted Plaintiff leave to amend its amended complaint within 21 days.

16 162. During the 21-day period between the time the Court granted Plaintiff leave
17 to amend its amended complaint and the date this second amended complaint was filed, upon
18 information and belief, Google independently took down at least four apps that had been available
19 for download on Google Play U.S. for at least 30 days prior to the takedown and that directly
20 infringed on Plaintiff's Spy Phone trademark: (a) "Spy Phone 2.0 by Magma"; (b) "Epf Spy Phone";
21 (c) "MySpyPhone"; and (d) "Spy Phone - Aplikacije za Android."

22 163. Prior to the removal of these four apps from Google Play, Plaintiff had not
23 identified any of them in its amended complaint, nor had Plaintiff lodged an online trademark
24 complaint with Google requesting their takedown.

25 164. Google's actions in independently taking down several apps that infringed on
26 Plaintiff's SPY PHONE® trademark without a specific complaint or request from Plaintiff
27 demonstrates that Google has the ability to independently monitor apps for trademark infringement
28 on Google Play and actually performs such independent monitoring.

165. The statements in the letter from the “Concerned Google Play Member” (Exhibit 4), which establish, among other things, that Google was aware, through its employees on the Google Play Team, of Plaintiff’s efforts to enforce its rights in its SPY PHONE® trademark and repeated infringement by other developers, when combined with evidence that the Google Play Team can and does independently monitor apps listed on Google Play for instances of trademark infringement, establish that Google actually knew of (or was willfully blind to) instances where Plaintiff’s trademark was being infringed by other developers since at least June 2013, but continued to permit such developers to list infringing apps on Google Play.

Google Continues To Apply Its Supposed Policy Prohibiting
App’s With the Word “Spy” in the Title Only To Plaintiff

166. On April 1, 2016, Plaintiff’s representative lodged online complaints against five highly-ranked apps with the word “spy” in the title: (a) a monitoring app with similar functionality to Plaintiff’s App called “Text Spy + FB, Line, Location”; (b) “Spy Camera HD,” a camera app with over 10 million downloads; (c) “Wifi Spy,” an app with 5 million downloads that claims it can detect authorized wireless users; (d) “Ear Spy – Super Hearing,” an app that claims it can turn a phone into a device for eavesdropping; and (e) “Spy Net Lie Detector,” an app that claims it can simulate a lie detector.

167. Google has taken no action to remove any of these apps from Google Play as of the date of this second amended complaint.

AS AND FOR A FIRST CAUSE OF ACTION

(Trademark Infringement/Trademark Dilution Against Ciuca and the Doe Defendants)

168. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if fully set forth herein.

169. Under § 32(a) of the Lanham Act, 15 U.S.C. § 1114(a), any person who uses in commerce any word, term or name or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association

1 of such person with another person, or as to the origin, sponsorship, or approval of his or her goods,
2 services, or commercial activities by another person, shall be liable in a civil action by any person
3 who believes that he or she is or is likely to be damaged by such act.

4 170. Under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), any person who, in
5 connection with any goods or services, uses in commerce any word, term, name, symbol, or device,
6 or any combination thereof, or any false designation of origin, false or misleading description of fact,
7 or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake,
8 or to deceive as to the affiliation, connection, or association of such person with another person, or
9 as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by
10 another person shall be liable in a civil action by any person who believes that he or she is or is likely
11 to be damaged by such act.

12 171. Since at least May 2013, Ciuca and the Doe Defendants, individually and/or
13 collectively, have offered and continue to offer apps for download on Google Play under the name
14 SPY PHONE®.

15 172. The acts of Ciuca and the Doe Defendants, as described above, infringe on
16 and diluted Plaintiff's federally registered SPY PHONE® trademark in violation of § 32(a) of the
17 Lanham Act, 15 U.S.C. § 1114(a) and § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

18 173. As a proximate result of the infringing actions taken by Ciuca and the Doe
19 Defendants, Plaintiff has suffered and will continue to suffer damage to its business, goodwill,
20 reputation, profits and the strength of its SPY PHONE® trademark.

21 174. An award of monetary damages alone cannot fully compensate Plaintiff for its
22 injuries and Plaintiff lacks an adequate remedy at law.

23 175. The acts of infringement and dilution by Ciuca and the Doe Defendants have
24 been and continue to be deliberate, willful and wanton, making this an exceptional case within the
25 meaning of 15 U.S.C. § 1117.

26 176. Plaintiff is entitled to a preliminary and permanent injunction against Ciuca
27 and the Doe Defendants, as well as all other remedies available under the Lanham Act, including,
28

1 but not limited to statutory damages, compensatory damages, treble damages, disgorgement of
2 profits, costs and attorneys' fees.

3
4 AS AND FOR A SECOND CAUSE OF ACTION
5 (Contributory Trademark Infringement Against Google)

6 177. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if
7 fully set forth herein.

8 178. Google has direct control over the operations of Google Play.

9 179. Google has the ability to monitor the content posted on Google Play and does,
10 in fact, regularly monitor the content posted on Google Play to ensure compliance with Google's
11 Developer Program Policies.

12 180. Since at least January 2015, Google has conducted "human reviews" of all
13 new apps listed for download on Google Play to ensure compliance with Google's Developer
14 Program Policies.

15 181. At all relevant times since at least June 2013, Google has been aware of
16 Plaintiff's SPY PHONE® trademark and Plaintiff's efforts and intention to enforce its trademark
17 rights.

18 182. Ciuca and the Doe Defendants have utilized Google Play to infringe on and
19 dilute Plaintiff's federally registered SPY PHONE® continuously and repeatedly since at least June
20 2013 .

21 183. Since at least June 2013, as a result of complaints lodged against specific apps
22 as well as Google's independent monitoring of the content on Google Play, Google has had actual
23 knowledge of particular apps posted by Ciuca and the Doe Defendants on Google Play that infringe
24 on and diluted Plaintiff's registered SPY PHONE® trademark, or has turned a blind eye to the
25 presence of such infringing apps on Google Play with knowledge that of the infringement in the
26 countries where Plaintiff's mark is registered.

27 184. Even in instances where Google has taken down apps that Google knew to be
28 infringing on and diluting Plaintiff's Spy Phone® trademark, Google failed to act in a timely and
reasonable manner to remove infringing apps from Google Play, thereby permitting such infringing

1 apps to remain available for download and for infringement to continue for an unreasonable period
2 of time after Google had actual notice of infringement.

3 185. Google has continued to supply its services to Ciuca and the Doe Defendants
4 with knowledge that they are offering apps for download on Google Play with names that infringe
5 on Plaintiff's registered SPY PHONE® trademark.

6 186. Google's actions are willful and with actual knowledge that Ciuca and the Doe
7 Defendants have used and are continuing to use Google Play as an instrumentality to engage in direct
8 trademark infringement and dilution of Plaintiff's SPY PHONE® trademark.

9 187. Google's acts and omission as described above constitute contributory
10 trademark infringement.

11 188. As a proximate result of the Google's actions or failure to act, Plaintiff has
12 suffered and will continue to suffer damage to its business, goodwill, reputation, profits and the
13 strength of its SPY PHONE® trademark.

14 189. An award of monetary damages alone cannot fully compensate Plaintiff for its
15 injuries and Plaintiff lacks an adequate remedy at law.

16 190. Google's acts of contributory infringement have been and continue to be
17 deliberate, willful and wanton, making this an exceptional case within the meaning of 15 U.S.C. §
18 1117.

19 191. Plaintiff is entitled to a preliminary and permanent injunction against Google,
20 as well as all other remedies available under the Lanham Act, including, but not limited to statutory
21 damages, compensatory damages, treble damages, disgorgement of profits, costs and attorneys' fees.

22
23 AS AND FOR A THIRD CAUSE OF ACTION
24 (Tortious Interference With Contract Against All Defendants)

25 192. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if
26 fully set forth herein.

27 ///

1 193. Plaintiff, at all relevant times, has had a contract with Google through its
2 AdSense® program under which Plaintiff earns revenue from advertising placed on Plaintiff's
3 website at <spyphone.com>.Plaintiff has at all times complied with the terms of this contract.

4 194. Under the terms of Plaintiff's contract with Google under the AdSense®
5 program, the revenue that Plaintiff earns increases based on the number of visitors to Plaintiff's
6 website, which, in turn increases based on the number of consumers that download Plaintiff's App.

7 195. All defendants are aware that Plaintiff generates revenue through the
8 AdSense® program and, therefore, had and has knowledge of Plaintiff's contract with Google under
9 the AdSense® program.

10 196. The acts of Ciuca and the Doe Defendants, which include infringing on
11 Plaintiff's Spy Phone® trademark, causing Plaintiff to be removed from Google Play by the filing of
12 false complaints against Plaintiff's App and/or actively encouraging members of the Google Play
13 Team to take adverse action against Plaintiff to remove Plaintiff's App from Google Play, were
14 intended to disrupt Plaintiff's contractual relationship under the AdSense® program.

15 197. The acts of Google, acting through the Google Play Team without the
16 knowledge or consent of the employees in the business unit that operates Google's AdSense®
17 program, which include, abusing its discretion to take down non-compliant apps under § 7.2 of the
18 DDA, violating the implied covenant of good faith and fair dealing contained in the DDA,
19 prohibiting Plaintiff from offering Plaintiff's App for download on Google Play under the brand
20 name SPY PHONE® without justification while allowing other developers to list apps using the
21 word "spy" and the phrase "spy phone," terminating and/or suspending Plaintiff's developer account
22 without justification or contractual basis, and taking adverse action against Plaintiff at the behest of
23 developers who compete with Plaintiff, were intended to disrupt Plaintiff's contractual relationship
24 under the AdSense® program.

25 198. The acts of defendants described herein caused an actual disruption of
26 Plaintiff's contractual relationship under the AdSense® program because the unjustified removal of
27 Plaintiff's App from Google Play reduced the number of consumers that downloaded Plaintiff's App
28

1 which, in turn, reduced the number of visitors to Plaintiff's website at <spyphone.com> and
2 decreased Plaintiff's revenue.

3 199. The acts of defendants caused Plaintiff to suffer damages in the form of
4 decreased advertising revenue under the AdSense® program.

5 200. Plaintiff is entitled to damages for past and present harm as well as injunctive
6 relief to restrain defendants from interfering with its contractual relationship.

7
8 AS AND FOR A FOURTH CAUSE OF ACTION

(Tortious Interference With Prospective Economic Advantage Against All Defendants)

9 201. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if
10 fully set forth herein.

11 202. Plaintiff earned an average of 45¢ in advertising revenue per download of
12 Plaintiff's App from April 2013 through December 2015 and has earned 22.5¢ per download of
13 Plaintiff's App thereafter, establishing an economic relationship with the probability of future
14 economic benefit between Plaintiff and the owners of Android®-based mobile devices who wish to
15 download Plaintiff's App on Google Play.

16 203. All defendants were aware of the prospective relationship between Plaintiff
17 and the owners of Android®-based mobile devices who wish to download Plaintiff's App on Google
18 Play.

19 204. Ciuca and the Doe Defendants, intentionally and without justification or
20 excuse, interfered with Plaintiff's economic relationship with owners of Android®-based mobile
21 devices who wished to download Plaintiff's App on Google Play by taking the actions described
22 above, which include, among other things, offering apps for download on Google Play with names
23 that infringe on Plaintiff's SPY PHONE® trademark, submitting false complaints to the Google Play
24 Team about Plaintiff's App with the intention of having Plaintiff's App removed from Google Play,
25 and actively encouraging members of the Google Play Team to take adverse action against Plaintiff
26 to prevent him from engaging in fair business competition.

27 205. Google, acting by and through its employees on the Google Play Team,
28 intentionally and without justification or excuse, interfered with Plaintiff's economic relationship

1 with owners of Android®-based mobile devices who wished to download Plaintiff's App on Google
2 Play by taking the actions described above, which include, among other things, abusing its discretion
3 to take down non-compliant apps under § 7.2 of the DDA, violating the implied covenant of good
4 faith and fair dealing contained in the DDA, prohibiting Plaintiff from offering Plaintiff's App for
5 download on Google Play under the brand name SPY PHONE® without justification while allowing
6 other developers to list apps using the word "spy" and the phrase "spy phone," terminating and/or
7 suspending Plaintiff's developer account without justification or contractual basis, and taking
8 adverse action against Plaintiff at the behest of developers who compete with Plaintiff.

9 206. The actions of defendants described above actually interfered with the
10 economic relationship between Plaintiff and the owners of Android®-based mobile devices who wish
11 to download Plaintiff's App on Google Play because Plaintiff's App could not be downloaded at all
12 during the periods that Plaintiff's App had been removed from Google Play and Plaintiff's App was
13 downloaded less frequently than it would have had Plaintiff been permitted to identify Plaintiff's
14 App using its SPY PHONE® trademark instead of being forced to use the name Phone Tracker.

15 207. The actions of all defendants described above, including violations of the
16 Lanham Act, the filing of false complaints by Ciuca and the Doe Defendants, and Google's breach
17 of the implied covenant of good faith and fair dealing in the DDA in removing Plaintiff's App from
18 Google Play and terminating or suspending Plaintiff's developer account, each constitutes an act that
19 is independently wrongful apart from the interference with Plaintiff's economic relationships.

20 208. As a proximate result of defendants' interference with Plaintiff's relationship
21 economic with the owners of Android®-based mobile devices who wish to download Plaintiff's App
22 on Google Play, Plaintiff suffered a loss of advertising revenue.

23 209. In addition to economic damages, Plaintiff has suffered and will continue to
24 suffer irreparably harm to its business that is being proximately caused by defendants' actions as
25 described above, for which Plaintiff has no adequate remedy at law.

26 210. Plaintiff is entitled to damages for past and present harm as well as injunctive
27 relief to restrain defendants from interfering with its business.

28 ///

AS AND FOR A FIFTH CAUSE OF ACTION

(Breach of Contract and the Covenant of Good Faith and Fair Dealing Against Google)

211. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if fully set forth herein.

212. Plaintiff and Google are parties to the DDA, which is a valid and binding contract.

213. The DDA contains an implied covenant of good faith and fair dealing in its performance and its enforcement.

214. Plaintiff fully performed its obligations under the DDA.

215. Google breached the implied covenant of good faith and fair dealing in the parties' agreement, by removing Plaintiff's App from Google Play in bad faith and without justification, by abusing the discretion afforded to Google with respect to app takedowns under § 7.2 of the DDA, by abusing the discretion afforded to Google under § 7.2 of the DDA, and through its bad faith and unjustified determination that Plaintiff's use of its SPY PHONE® trademark to identify Plaintiff's App violated one or more of Google Play's Developer Program Policies.

216. Google further breached the parties' agreement by deleting and refusing to allow Plaintiff to re-post customer reviews of Plaintiff's App after Plaintiff's developer account was reinstated after being unjustifiably terminated and suspended in 2013 and 2014.

217. Plaintiff is entitled to damages proximately caused by Plaintiff's breach in an amount to be proven at trial.

218. Plaintiff is entitled to a declaration that the use of its SPY PHONE® trademark to identify Plaintiff's App does not violate the terms of the DDA.

AS AND FOR A SIXTH CAUSE OF ACTION

(Violation of Cal. Bus. and Prof. Code §§ 17200 *et seq.* Against All Defendants)

219. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if fully set forth herein.

1 220. The California UCL prohibits a person from engaging in an unlawful, unfair
2 or fraudulent business act or practice.

3 221. Defendants' actions as described above, which include infringement on
4 Plaintiff's SPY PHONE® trademark, submitting false complaints to the Google Play Team about
5 Plaintiff's App, violating the implied covenant of good faith and fair dealing contained in the DDA
6 and otherwise breaching the DDA, and/or suspending Plaintiff's developer account without
7 justification, each constitute an act prohibited by the UCL.

8 222. Plaintiff is entitled to injunctive relief restraining defendants from taking any
9 action to harm or interfere with Plaintiff's business, and, in particular, restraining defendants from
10 taking any action to interfere with Plaintiff's lawful and legitimate right to use its SPY PHONE®
11 trademark to identify Plaintiff's App.

12 WHEREFORE, Plaintiff demands judgment as follows:

13 A. on all counts, awarding Plaintiff a preliminary and permanent injunction: (i)
14 that restrains and enjoins defendants, their agents, servants, employees, and all other persons in privity or
15 acting in concert, from engaging in any conduct that infringes on Plaintiff's SPY PHONE® trademark,
16 contributes to the infringement of Plaintiff's SPY PHONE® trademark by others and/or interferes
17 with Plaintiff's rights to do business with prospective customers, and (ii) that compels Google to
18 allow Plaintiff to use its SPY PHONE® trademark on Google Play and restore all deleted customer
19 reviews and other information associated with Plaintiff's App;

20 B. on all counts except the Sixth Count, awarding Plaintiff damages that it has
21 sustained as a consequence of defendants' conduct as described herein and, with respect to any
22 damages awarded under claims brought under the Lanham Act, the trebling of all such damages
23 pursuant to 15 U.S.C. § 1117 or, alternatively and at its election, an award of statutory damages
24 pursuant to 15 U.S.C. § 1117 of up to \$2,000,000 for willful infringement and/or contributing to the
25 willful infringement of Plaintiff's SPY PHONE® trademark;

26 C. on all claims brought under the Lanham Act, awarding Plaintiff reasonable
27 attorneys' fees pursuant to 15 U.S.C. § 1117;

28 D. awarding Plaintiff the costs of this action and pre-judgment interest;

1 and

2 E. for such other and further relief as the Court deems just and proper.

3 **JURY DEMAND**

4 Plaintiff demands a trial by jury on all issues so triable.

5 Dated: April 11, 2016

RIMON P.C.

7 By: /S/ Neil A. Smith
8 Neil A. Smith

9 GREENBERG FREEMAN LLP

10 By: /S/ Michael A. Freeman
11 Michael A. Freeman (*pro hac vice*)

12 Attorneys for the Plaintiff
13 SPY PHONE LABS LLC.

CERTIFICATE OF SERVICE

I, Neil A. Smith, hereby certify that on April 11, 2016 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

Date: April 11, 2016

RIMON PC

/s/ Neil A. Smith
NEIL A. SMITH
Attorneys for SPY PHONE LABS LLC